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No. 84-1362

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,  
*Petitioner,*

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE  
COMPANY OF MARYLAND,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Do the federal district courts have jurisdiction under Section 401(b) of the Communications Act (which authorizes suits to enforce "any order" of the FCC except an order for the payment of money) to enjoin a state commission's undenied violation of an FCC order that was served on the state commission and required compliance with depreciation policies and rates set by the FCC in a proceeding in which the state commission participated?

2. Are state commissions such as the petitioner excluded from the definition of "person" in Section 401(b) of the Communications Act, making them immune from any suits by the FCC or private parties to enjoin their refusal to obey an FCC order?

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

The Chesapeake and Potomac Telephone Company of Maryland (hereinafter "C&P")<sup>1</sup> hereby responds to and opposes petitioner Public Service Commission of Maryland's (hereinafter "Maryland PSC") petition for review of the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on November 20, 1984.

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<sup>1</sup> Respondent C&P is a wholly-owned subsidiary of Bell Atlantic Corporation. The affiliates of C&P with publicly traded securities are as follows:

The Bell Telephone Company of Pennsylvania  
The Chesapeake and Potomac Telephone Company  
The Chesapeake and Potomac Telephone Company of Virginia  
The Chesapeake and Potomac Telephone Company of West Virginia  
The Diamond State Telephone Company  
New Jersey Bell Telephone Company



### Opinions Below

The opinion of the Fourth Circuit in this case, and the preceding decision of the United States District Court for the District of Maryland, are attached as Appendices A and B, respectively, to the Maryland PSC's brief and are reported at 748 F.2d 879 (1984) and 560 F. Supp. 844 (1983).

### Statement of the Case

This case involves the Maryland PSC's defiance of a series of Federal Communications Commission ("FCC") orders (i) prescribing depreciation rates and policies for C&P's telephone plant jointly used to provide interstate and intrastate service, and (ii) directing that all state utility commissions, including the Maryland PSC, not depart from those federally prescribed depreciation rates in determining charges for intrastate telephone service. The Maryland PSC refused to comply with these orders even though it participated in the FCC proceedings in which the depreciation rates for C&P were set, and was served with a copy of the FCC ruling directing that state commissions apply the FCC-prescribed depreciation rates in setting intrastate telephone charges.

C&P's telephone plant is jointly used to provide both interstate and intrastate service. For example, a telephone line at a customer's home or office is used to make both local intrastate calls and long-distance interstate calls.

Section 220(b) of the Communications Act of 1934, 47 U.S.C. § 220(b), authorizes the FCC to prescribe depreciation rates for this jointly used telephone plant. In 1982, the FCC issued three separate orders setting depreciation rates for various classes of C&P property which is jointly used to provide both interstate and intrastate service.<sup>2</sup> The Maryland PSC participated in all three proceedings and voiced its opposition

<sup>2</sup> *American Tel. & Tel. Co.*, 88 F.C.C.2d 1223 (1982) (depreciation rates for C&P's existing telephone plant); *The Chesapeake and Potomac Telephone Co.*, 90 F.C.C.2d 964 (1982) (depreciation rates for new outside plant); *American Tel. & Tel. Co.*, 92 F.C.C.2d 693 (1982) (depreciation rates for new central office equipment).

to the rates ultimately prescribed for C&P by the FCC. In all three orders (hereinafter the "Prescription Orders"), the question of whether the FCC's depreciation prescriptions would be binding for intrastate ratemaking purposes was raised by the participating state commissions.<sup>3</sup> The final resolution of this question was addressed in the last of the three orders, in which the FCC announced that "[w]e have today ruled that our depreciation orders are binding at both the federal and state levels,"<sup>4</sup> and cited an order adopted the same day in a separate proceeding, *In re Amendment of Part 31, Uniform System of Accounts, etc.*, 92 F.C.C.2d 864 (1983) (hereinafter the "Preemption Order").

The Preemption Order was issued after extensive deliberations in which numerous state regulatory commissions actively participated. The FCC there declared that "where the [FCC] prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates" because "inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void." 92 F.C.C.2d at 879 (emphasis added). The FCC directed that the Preemption Order "be served on each state commission," *id.* at 880, and a copy was in fact served on the Maryland PSC.

Rather than appeal the Prescription Orders or the Preemption Order,<sup>5</sup> as it could have pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), the Maryland PSC chose to defy those FCC rulings. In a general ratemaking proceeding relating to C&P, the Maryland PSC on February 18, 1983 issued an order in which it expressly refused to comply with the FCC's Preemption Order—on the stated ground that

<sup>3</sup> *American Tel. & Tel. Co.*, *supra*, 88 F.C.C.2d at 1232, 1237; *The Chesapeake and Potomac Tel. Co.*, *supra*, 90 F.C.C.2d at 968, 971; *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 697, 700.

<sup>4</sup> *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 700 (emphasis added).

<sup>5</sup> The Preemption Order was appealed by another state commission to the Fourth Circuit, which upheld its validity in *Virginia State Corporation Commission v. FCC*, 737 F.2d 388 (1984), *petition for cert. filed sub nom. California, et al. v. FCC*, 53 U.S.L.W. 3449 (U.S. Dec. 10, 1984) (No. 84-889).

the FCC simply was wrong—and sought to apply depreciation rates for intrastate service different from those prescribed by the FCC in the Prescription Orders.<sup>6</sup>

C&P then initiated this action in the United States District Court for the District of Maryland to enjoin the Maryland PSC and each of its individual members from prohibiting C&P from collecting charges that reflected the FCC-mandated depreciation rates. Jurisdiction was based, *inter alia*, on Section 401(b) of the Communications Act, 47 U.S.C. § 401(b). Section 401(b) authorizes the United States, the FCC, and any injured private party to bring suit in the federal district courts for the enforcement of “any order of the Commission other than for the payment of money” against “any person” disobeying such an order.<sup>7</sup> ○

<sup>6</sup> The Maryland PSC determined that “the depreciation practices established by the FCC in no way limit this Commission’s authority to independently determine the appropriate level of depreciation expense to be reflected in intrastate rates for telephone service.” Order No. 66114, *In the Matter of the Application of the Chesapeake and Potomac Telephone Company of Maryland to Increase and Restructure Its Schedule of Rates and Charges*, Case No. 7661, at 18 (Feb. 18, 1983).

<sup>7</sup> Section 401(b) provides, in full, as follows:

“If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.”

FCC orders are conclusively valid for purposes of enforcement suits brought in the federal district courts under Section 401(b); the validity of an FCC order can only be reviewed by a court of appeals pursuant to Section 402 of the Communications Act. *FCC v. ITT World Communications, Inc.*, — U.S. —, 104 S. Ct. 1936, 1939 (1984).

The district court, after determining that jurisdiction existed under Section 401(b), entered a preliminary injunction requiring the Maryland PSC to permit C&P to use the depreciation rates and methodologies prescribed by the FCC. 560 F. Supp. at 847. The district court found that C&P was sustaining irreparable injury because the intrastate charges approved by the Maryland PSC produced \$16.1 million less in revenues than would have been produced had the charges been set using the FCC-prescribed depreciation rates, and that state law precluded C&P from subsequently recovering the intervening shortfall. *Id.* at 848.

The Maryland PSC subsequently appealed to the Fourth Circuit, which on November 20, 1984 upheld the district court’s issuance of the injunction. The Fourth Circuit ruled that the Preemption Order is an “order” enforceable under Section 401(b) and rejected the Maryland PSC’s contention that it is not a “person” within the meaning of Section 401(b). 748 F.2d at 881.

### Reasons for Denying the Writ

The Maryland PSC’s petition for review of the Fourth Circuit’s decision should be denied. The reasons for denying the writ can be summarized as follows:

1. The Fourth Circuit correctly decided in this case that the Preemption Order is encompassed by the phrase “any order” in Section 401(b) and is enforceable thereunder. The Fifth Circuit expressly reached the same conclusion in *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *appeal filed*, No. 84-870 (U.S. Nov. 30, 1984). Moreover, the Preemption Order has been enforced against state commissions by the Eighth Circuit and by a number of federal district courts.<sup>8</sup> The single contrary decision is that of the First Circuit in *New England*

<sup>8</sup> *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3290 (U.S. Sept. 26, 1984) (No. 84-483); *Wisconsin Bell, Inc. v. Public Service Comm’n of Wisconsin*, Civ. No. 84-C-4 (E.D. Wis. Nov. 13, 1984); *Mountain States*

(footnote continues)



*Telephone and Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900), on the ground that the Preemption Order is a rulemaking order not enforceable under Section 401(b).<sup>9</sup> While the lack of accord among the circuits is one of several factors considered by the Court in passing upon petitions for review,<sup>10</sup> the circumstances of this case do not warrant grant of the petition:

—The Fourth Circuit's decision is supported strongly by the broad language of the statute referring to "any order" and at least two decisions of this Court. *Ambassador v. United States*, 325 U.S. 317 (1945); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1945). In addition, the FCC—the agency charged with administering the Communications Act—has stated its view that the Preemption Order is enforceable under Section 401(b).

—The First Circuit's construction of the phrase "any order" in Section 401(b) as not including "rulemaking decisions" like the Preemption Order not only mischaracterizes the nature of the Preemption Order, but also (i) is a solitary holding that has not been followed in any other circuit and (ii) is without any precedential support. There is no cause for the Court to review a case simply because of a single errant court of appeals decision, particularly where, as here, there is already controlling precedent of the Court.

(footnote continued)

*Tel. & Tel. Co. v. Department of Public Service Regulation*, 588 F. Supp. 5, 9 (D. Mont. 1983); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, No. 83-4090 (D. Kan. Apr. 8, 1983); *Pacific N.W. Bell Tel. Co. v. Washington Utility and Transportation Comm'n*, 565 F. Supp. 17, 21 (W.D. Wash. 1983). In *New England Tel. & Tel. Co. v. Public Service Bd. of Vermont*, 576 F. Supp. 490, 496 (D. Vt. 1983), the district court originally declined to enforce the Preemption Order, but the district court's decision was subsequently vacated as moot.

<sup>9</sup> The decision of the Fifth Circuit—inexplicably not mentioned in the Maryland PSC's petition—considered at length and rejected the prior, contrary determination of the First Circuit in the *New England Telephone* case.

<sup>10</sup> This factor is "neither controlling nor fully measur[es] the Court's discretion." Supreme Court Rule 17.1.

—The construction of the term "order" advanced by the Maryland PSC in any event defies common sense. There is no question that the Maryland PSC acted in violation of the Preemption Order, which was served upon it and was intended by the FCC to be immediately binding. There is no reason why a superfluous adjudicatory proceeding should be required, to declare unlawful the Maryland PSC's undenied violation of the Prescription Orders and the Preemption Order, before action can be taken by anyone to halt an ongoing violation of law causing irreparable injury to regulated parties. Congress could not have intended in Section 401(b) to stymie in this awkward manner the ability of the FCC and private parties to enjoin promptly clear violations of self-executing FCC orders.

2. The Maryland PSC's petition for review on the grounds that it is not a "person" subject to suit under Section 401(b) should likewise be denied. The question involved is one of routine statutory interpretation that was correctly decided by the Fourth Circuit, and there is not even any conflict among the circuits on this issue. If the Maryland PSC's argument that a state commission is not a "person" under Section 401(b) were accepted, state utility commissions would effectively be free to violate all orders of the FCC with impunity, a result hardly consistent with the rule of law and Congress' intention in the Communications Act to regulate the exercise of state power.

#### **I. The Fourth Circuit Properly Determined that the Preemption Order Is an "Order" Enforceable Under Section 401(b) of the Communications Act, and There Is No Need for Review of That Determination by This Court**

The Maryland PSC contends in its petition for review that the Preemption Order was not issued in an "adjudicatory" proceeding, and that the FCC's directive therein that the state commissions comply with FCC-prescribed depreciation rates is therefore not a type of "order" enforceable under Section 401(b). This contention is confronted at the outset by the character and context of the Preemption Order. As described above (at pp. 2-3), the Maryland PSC participated in the three proceedings in which the Prescription Orders were issued, the last of which cited the Preemption Order and stated that the



depreciation rates prescribed by the FCC are to be binding on the state commissions. Additionally, the Preemption Order (i) was served on the Maryland PSC at the FCC's direction, (ii) requires no further interpretation by the FCC, and (iii) indisputably was intended by the FCC to be immediately binding on the Maryland PSC and all other state commissions. Under these circumstances, the Maryland PSC's characterization of the Preemption Order as no more than a general "rulemaking decision," as opposed to a specific and self-executing agency order, is simply inaccurate.

Even if the Preemption Order were labelled a "rulemaking" order, it nonetheless is enforceable under Section 401(b) of the Communications Act. That statutory provision grants the federal district courts jurisdiction over any action brought by the FCC, the United States, or "any injured party" to enforce "any order of the Commission other than for the payment of money" against "any person" that "fails or neglects to obey" the order. (Emphasis added.) The statutory language of Section 401(b)—phrased in these sweeping terms and referring broadly to "any order"—does not distinguish between "adjudicatory" orders and self-executing "rulemaking" orders served by the FCC on specific parties. The common-sense meaning of the statutory language thus refutes the Maryland PSC's contention that the language of Section 401(b) should somehow be construed as only permitting enforcement of "orders" of the former type but not of the latter type.<sup>11</sup>

Any doubt as to the correctness of the decision below, and to the possible need for the Court's review of that decision, should be dispelled by the decisions of *this* Court confirming

<sup>11</sup> As this Court recently explained:

"[I]n all cases involving statutory construction, 'our starting point must be the language employed by Congress,' *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' *Richards v. United States*, 369 U.S. 1, 9 (1962). Thus, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

that the term "order" as used in Section 401(b) and an adjacent jurisdictional provision of the Communications Act includes self-executing FCC orders reached through rulemaking or similar proceedings.

First, in *Ambassador v. United States*, 325 U.S. 317 (1945), the Court held that the FCC could bring suit under "§ 401" against hotels for their violation of a tariff regulation that had been filed by a telephone company in compliance with an FCC rulemaking order but that had not been specifically reviewed by the FCC. In citing Section 401 in support of its conclusion that "the prosecution of an action to restrain a violation is authorized," 325 U.S. at 325, the Court could only have been referring to Section 401(b). Section 401(a)—the only other portion of Section 401 granting the federal district courts any jurisdiction—only authorizes a district court to enjoin violations of the Communications Act itself,<sup>12</sup> and the violation of a tariff regulation is obviously not a violation of any provision of the Act. See *South Central Bell, supra*, 744 F.2d at 1117. If a tariff filed by a telephone company is enforceable under Section 401(b), a formal FCC ruling such as the Preemption Order should certainly be enforceable as well.

Second, in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), the Court held that self-executing FCC regulations were "orders" within the meaning of Section 402(a) of the Communications Act, which provides for appellate court review of "any order of the Commission under this chapter . . ." 47 U.S.C. § 402(a) (emphasis added). The same conclusion must apply to the term "order" in Section 401(b), the jurisdictional provision immediately preceding Section 402.<sup>13</sup> There is a "natural presumption that identical words

<sup>12</sup> Section 401(a) provides as follows:

"The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter." 47 U.S.C. § 401(a).

<sup>13</sup> FCC rulemaking orders prescribing accounting methods and depreciation rates and practices have long been thought reviewable under Section 402(a). See, e.g., *American Tel. & Tel. Co. v. United States*, 299 U.S. 232 (1936).

used in different parts of the same act are intended to have the same meaning," *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932), and any departure from this presumption is not warranted where, as here, there is no express legislative history indicating that a different meaning was intended. Indeed, as the Fifth Circuit noted, "the First Circuit was not able to cite, and our own research fails to uncover, a single precedent in support of its [contrary] interpretation." *South Central Bell, supra*, 744 F.2d at 1116 (footnote omitted).

There are also persuasive policy grounds for concluding that the Preemption Order—which was served upon and said by the FCC to bind the state commissions—falls within the "any order" phrase of Section 401(b). If that were not the case, neither the FCC nor any private party—no matter how adversely affected by a state commission's undisputed defiance of an unequivocal FCC rulemaking order—could enforce such an order until the FCC had commenced and concluded an adjudicatory proceeding to command the obedience of the particular state commission. This would require redundant FCC proceedings that would serve no constructive purpose. By the Preemption Order, the FCC required compliance of all state commissions with FCC-prescribed depreciation rates and policies; and by the Prescription Order proceedings, in which the Maryland PSC participated, the FCC defined the exact rates and policies which C&P was to follow for interstate and intrastate ratemaking purposes. The Maryland PSC has not explained and cannot explain why the FCC should have to repeat itself in an adjudicatory order before injunctive relief can be obtained against the admitted violation of a substantive rule of law which would cause irreparable damage to C&P and to the federal interest.

Indeed, the FCC has spoken in favor of private enforcement of the Preemption Order and self-executing FCC rules under Section 401(b). As the agency charged with administering the Communications Act, the FCC's views are entitled to considerable weight.<sup>14</sup> In an *amicus curiae* brief submitted to

<sup>14</sup> E.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 2778, 2782 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's

(footnote continues)

the First Circuit in *New England Telephone, supra*, in support of a petition for rehearing, the FCC said as follows:

"The Commission has broad discretion to use either rulemaking or case-by-case adjudication (or some combination of both) to carry out its responsibility to enforce the Act. It is well within that discretion for it to adopt self-executing rules to implement the Act and then to rely in part on private enforcement actions such as the ones involved in the several depreciation cases. The very justification for a private enforcement statute such as Section 401(b) is that the agency may not have the resources to police every violation of its orders and that aggrieved private parties with something at stake can help it with its job."<sup>15</sup>

The FCC also noted in its amicus brief that the possible need in some cases—but not in the case of the Preemption Order—for the agency's special expertise in applying FCC rulemaking orders does not require that such FCC orders *never* be enforceable under Section 401(b).<sup>16</sup>

(footnote continued)

construction of a statutory scheme it is entrusted to administer. . . ." (footnote omitted); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27 (1971).

<sup>15</sup> Memorandum of Federal Communications Commission as Amicus Curiae in Support of Petition for Rehearing, at 14 (July 27, 1984), *New England Telephone, supra* (footnotes omitted).

<sup>16</sup> As the FCC explained:

"If questions of interpretation or basic fact or broad communications policy arise, the enforcing court can and should either refer such questions to the FCC under the doctrine of primary jurisdiction or solicit the FCC's views as an intervenor or as amicus curiae. In this way, the FCC's principal role as enforcer of the Communications Act is satisfied, and the district court fulfills the specific role Congress made for it in Section 401(b)."

*Id.* at 15 (footnote omitted).

In *South Central Bell, supra*, the Fifth Circuit similarly observed that "through the use of agency intervention and amicus curiae briefs, as well as through the application of the doctrine of primary jurisdiction, the courts and the FCC should be able to prevent both significant inconsistent application of FCC rules and serious judicial encroachment upon FCC responsibilities." 744 F.2d at 1118.



Finally, the Court's review of the decision of the Fourth Circuit in this case is not merited simply because the First Circuit has—in a solitary errant decision that itself is the subject of a certiorari petition—held that the Preemption Order is not an enforceable “order” under Section 401(b).<sup>17</sup> As noted above, the Fourth, Fifth, and Eighth Circuits have now upheld the enforceability of the Preemption Order under Section 401(b). The Seventh Circuit has, in connection with a different FCC order, also ruled that FCC rulemaking orders are enforceable under Section 401(b). *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 570 (7th Cir. 1984) (FCC rulemaking order freezing “separation” method used to allocate expenses between interstate and intrastate telephone company business is enforceable under Section 401(b)). In sum, there simply does not exist sufficient doubt as to the correctness of the decision in this case, or sufficient disagreement among the circuits, to merit the Court's review.

## II. There Is No Cause for the Court To Review the Fourth Circuit's Determination that the Petitioner Is a “Person” Subject to Suit Under Section 401(b)

The Maryland PSC also argues that the Court should grant its petition for review because the Fourth Circuit erred in holding that a state utility commission constitutes a “person” within the meaning of Section 401(b) and subject to enforcement of FCC orders thereunder. The scope of the term “person” in Section 401(b) involves a routine question of statutory interpretation of no great significance, and there is not even any split among the circuits on the interpretation of that term. Accordingly, this claim does not warrant the Court's review.

In addition to these factors, the Court's review is not warranted since the Fourth Circuit was on strong ground in ruling as it did.

<sup>17</sup> Even if the Court does not review and reverse the First Circuit's decision, the FCC is free under the First Circuit's decision to enter an adjudicatory order against the Public Utilities Commission of Maine compelling compliance with the Preemption Order. The Court's review is thus not required to ensure a consistent application of the Preemption Order.

First, the Maryland PSC's claim that the statutory definition of “person” excludes state commissions is erroneous. The definition of “person” in the Communications Act<sup>18</sup> describes what the term “includes.” Where a statutory definition is phrased in this manner, “the fact that the statute does not specifically mention a particular entity . . . does not imply that the entity falls outside of the definition.” *Highway & City Freight Drivers, Dockmen and Helpers, Local Union No. 600 v. Gordon Transports, Inc.*, 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002 (1978).<sup>19</sup> This rule of statutory construction has been specifically applied to federal statutes involving the definition of the term “person.”<sup>20</sup> The lack of any mention of “state commissions” in the Communications Act's definition of “person” is therefore of no significance.

Second, the interpretation of the term “person” urged by the Maryland PSC is inconsistent with the legislative purpose of the Communications Act. Each of the principal enforcement provisions of the Communications Act—and not just Section 401(b)—refers to “persons,” and none refer explicitly to “state commissions.”<sup>21</sup> Accordingly, if the Maryland PSC's reading of the term “person” in Section 401(b) were accepted, state

<sup>18</sup> The Communications Act defines the term “person” in the following manner:

“For the purpose of this Act, unless the context otherwise requires—

. . . .

(i) “‘Person’ includes an individual, partnership, association, joint-stock company, trust, or corporation.” 47 U.S.C. § 153.

<sup>19</sup> See, e.g., *Puerto Rico Maritime Shipping Authority v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) (use of the word “including” in statute indicates that the specified list which follows is illustrative, not exclusive); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968); 2A N.J. Singer, *Statutes and Statutory Construction* § 47.07 at 132 (Sands 4th ed. 1984).

<sup>20</sup> E.g., *United States v. City of New York*, 481 F. Supp. 4, 6 (S.D.N.Y.) (definition of “person” in Federal Water Pollution Control Act held to include municipalities even though not listed specifically in statutory definition), *aff'd*, 614 F.2d 1292 (2d Cir. 1979), cert. denied, 446 U.S. 936 (1980); *In re Maidman*, 2 Bankr. 569, 575-76 (Bankr. S.D.N.Y. 1980) (definition of “person” in Bankruptcy Act held to include noncorporate trustee), *aff'd*, 668 F.2d 682 (2d Cir. 1982).

<sup>21</sup> For example, Section 312(b) of the Communications Act provides that the FCC may order “persons” to cease and desist from violating or

(footnote continues)



commissions would be completely immune from any action brought by the FCC, the United States, or private parties to enforce FCC orders or the Communications Act itself.

Such a result would effectively place state utility commissions above the law and would frustrate and conflict with Congress' intent in the Communications Act to establish an efficient, nationwide communications policy under which the FCC in appropriate circumstances is empowered to preempt state authority.<sup>22</sup> Congress could not conceivably have enacted legislation designed to curb state power while providing no means of enforcement against actions of state commissions that conflict with superseding state law.

Finally, the individual members of the Maryland PSC were named defendants in this action and were ordered by the district court to comply with the terms of the Preemption Order. As the Fourth Circuit noted, "even if PSC is not a 'person' within the meaning of Section 401(b), PSC's officials are expressly covered by that section."<sup>23</sup> 748 F.2d at 881. The Maryland PSC's proffered interpretation of the term "person" as excluding state commissions is thus irrelevant and without merit.

(footnote continued)

failing to observe an FCC rule or regulation. 47 U.S.C. § 312(b). Section 401(a) of the Communications Act similarly provides that the Attorney General of the United States may, upon request of the FCC, bring an action in federal court to require "persons" to comply with the requirements of the Communications Act. 47 U.S.C. § 401(a).

<sup>22</sup> See, e.g., *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) ("Courts have consistently held that when state regulation of interstate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulation must necessarily yield to the federal regulatory scheme") (footnotes omitted), *cert. denied*, 461 U.S. 938 (1983); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1043-44 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

<sup>23</sup> The practice of naming individual state officers as defendants in injunction suits challenging actions of state utility commissions is a common one, and stems from this Court's decisions construing the Eleventh Amendment. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman v. Jordan*, 415 U.S. 651, 665 (1974); *Ex parte Young*, 209 U.S. 123, 159 (1908). See generally C. Wright, *The Law of Federal Courts* 292 (4th ed. 1983).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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